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CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1940

No. 480

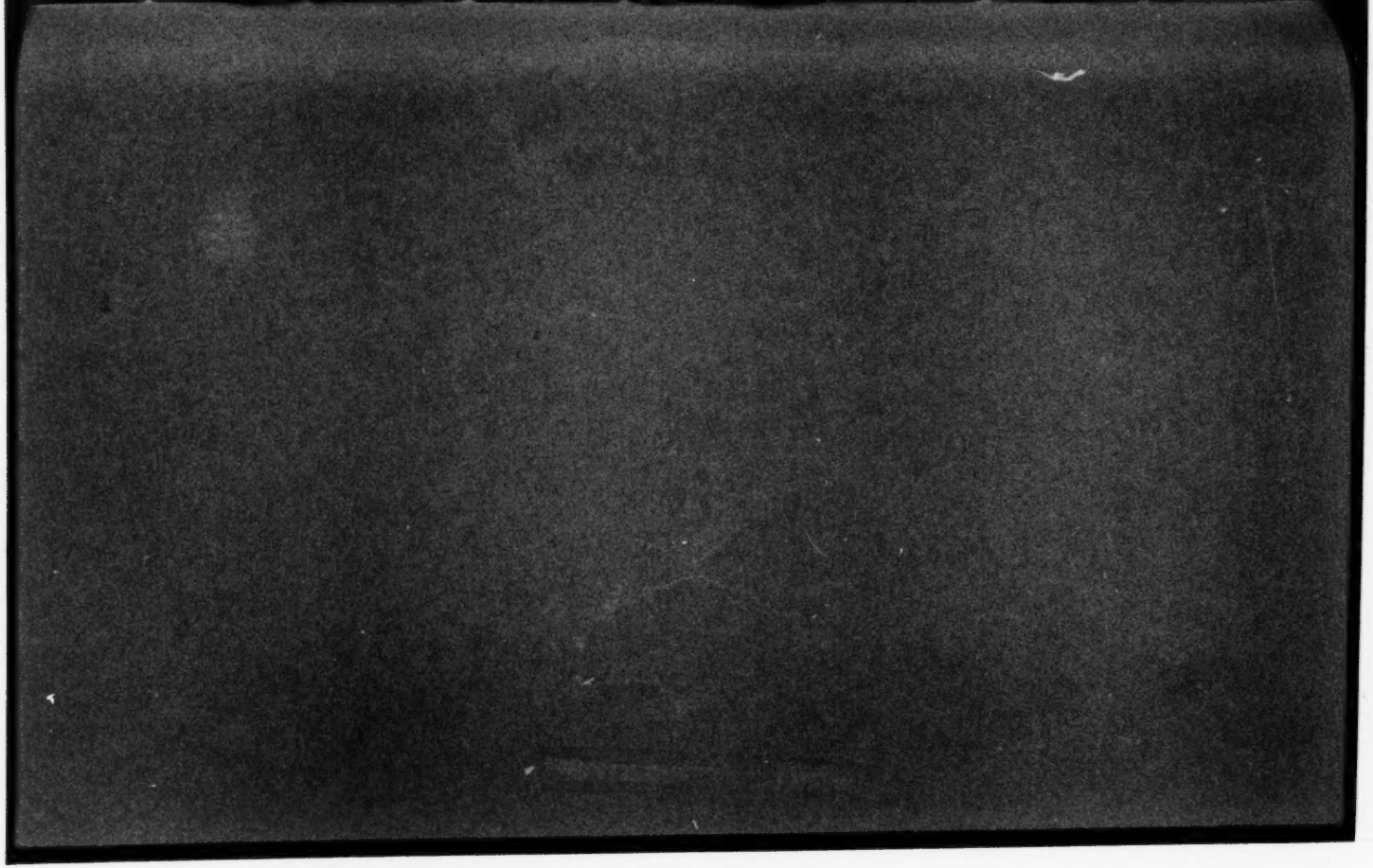
I. B. MELVILLE, A. C. MONSON, H. G. DAY, CHARLES C. SACKMANN and C. D. CUTLER, as Trustees of District Landowners Trust, I. B. MELVILLE, A. C. MONSON, H. G. DAY, CHARLES C. SACKMANN, C. D. CUTLER and HUBERT L. SHATTUCK, PETITIONERS,

vs.

ARTHUR WEYBREW, ELMER L. OUDERKIRK, ELLA BOSTWICK, GLEN BOSTWICK, ELIZABETH B. BOSTWICK, STEPHEN J. CUSTY, JOHN McHUGH, EGLI GOTTLIEB, TRAVIS C. SWEATT and FARMS SECURITY COMPANY, a corporation, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI, SUMMARY STATEMENT AND ASSIGNMENTS OF ERROR.

IRVING B. MELVILLE,
Security Building, Denver Colorado,
Attorney pro se and for other Petitioners.



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PETITION FOR WRIT OF CERTIORARI,

Come now your petitioners and respectfully request that a Writ of Certiorari issue out of this Court to review the final judgment of the supreme court of the State of Colorado in Cause No. 14634, in which your petitioners are plaintiffs in error, and respondents defendants in error—and, for grounds therefor, petitioners assert that petitioners District Landowners Trust and its Trustees have been deprived of their property without due process of law in violation of article five, and that their written contract with respondents has been impaired and set aside, and that they have been deprived of their property without due process of law, and have not been given the equal protection of the law, in violation of section one of article fourteen of the Amendments to the Constitution of the United States; and the petitioners, as individuals and in their respective individual capacities, allege that they, respectively, have been deprived of their personal rights and property in violation of article five and of article fourteen, and each have been denied the equal protection of the laws in violation of article fourteen, of the Amendments to the Constitution of the United States.

Respectfully submitted,

I. B. MELVILLE,
Attorney pro se, and Attorney for the other Petitioners herein named.

STATE OF COLORADO
City and County of Denver } ss.

I. B. Melville of lawful age, being first duly sworn, deposes and says that he is one of the trustee petitioners herein and is the secretary and business manager of petitioner District Landowners Trust, and he is one of the petitioners sued in their individual capacities, and that he has read the above and foregoing petition and knows the contents thereof; and that the matters and things in said petition set forth are true to the best of his knowledge and belief.

I. B. MELVILLE.

Subscribed and sworn to before me this thirtieth day of September, 1940.

A. H. WHITE,
Clerk of the Supreme Court of the
(Seal) State of Colorado.

Filed in cause No. 14634 Colorado Supreme Court, September 30, 1940, for transmission to United States Supreme Court.

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SUMMARY STATEMENT.

This proceeding involves the present and future status of a large contiguous body of arable land practically adjoining the City of Denver, Colorado, and the irrigable portion, comprising about 40,000 acres, since 1926 has received the available surplus water from the City; and, in the future will continue to receive such water under the terms of an irrevocable resolution of its board of water commissioners, if petitioners are successful in this Court

This land comprises The East Denver Municipal Irrigation District, organized under the Colorado laws in 1910 with an authorized statutory bond issue of $3,000,000 for constructing a system of irrigation works including the necessary water for irrigating the land; and, in 1913 Henry L. Doherty & Company of New York City contracted to build such system and furnish the required water for irrigation but before the system was completed in that year a dispute arose with the Reservoir Company furnishing the water, and in the spring of 1914, the Reservoir Company sold the water to the City of Denver; and in December, 1916, a landowners suit was brought against Doherty & Company for the recovery of the bonds obtained by them, which was determined in favor of the landowners in October, 1923.

In the spring of 1924 it became possible to effect a compromise between the then holders of the bonds, the landowners, Doherty & Company, and the Board of Water Commissioners of the City of Denver, as the latter had been enjoined in the spring of 1914 from completing the purchase of the water; and on account of the intricacies and magnitude of the hundreds of matters to be accomplished, it was agreed by all interested parties that it could be accomplished best by a

body of trustees under a trust agreement, as the lands alone had outstanding principal of bonds amounting to $713,500, with unpaid coupons covering a perior of 11 years, unpaid judgments on part thereof amounting to several hundred thousands of dollars, rights of way judgments, warrants, and other indebtedness such as unpaid general and irrigation district taxes, in some instances covering the entire period of litigation—all at that time approximating $40 per acre with additional outstanding unmatured bonds.

Hence in April, 1924, the District Landowners Trust was organized and is governed by a board of five trustees under a Declaration of Trust recorded in the office of the recorder of the various counties in which the system of irrigation works and the lands are located, and the settlements made and the Declaration of Trust were approved by the qualified electors of the District at an election duly called and held on June 21, 1924, and the board of trustees forthwith thereafter took charge of the system of irrigation works and other assets of the District and proceeded to place the then present system in operating condition and to construct additional reservoirs; and assumed and paid all District liabilities, including all outstanding bonds and warrants and judgments, and made written contracts with all owners of land in accordance with the terms and condtiions of said Declaration of Trust, who desired so to do and were willing to pay their respective delinquent general and irrigation district taxes, on an adjusted basis of approximately 18 per cent of the amount owing, and who were willing to give a promissory note in the amount of $20 per acre on the irrigable portions of their land only and secure the same by trust deed—such landowner's land thereafter being free and clear of all other incumbrances including taxes, but subject to future general and irrigation district

taxes in accordance with the irrigation district law of Colorado, the water for irrigation to be received from the board of water commissioners of the City of Denver annually, the first half paid by July 1, and the other one-half by November 1 of each year.

This plan was carried out from the time of the organization of the Trust, except non-resident owners failed to pay their taxes or any part of the interest or principal of their notes beginning with the low prices and the drouth in about 1930 (most of the landowners were non-residents) without any protest, until February 16, 1939, when plaintiffs below, respondents here, filed their complaint in the district court of the City and County of Denver, with a copy of the Declaration of Trust attached thereto and in support thereof, alleging themselves to be owners of land in the District and each an owner of a certificate of beneficial interest, by virtue of which they are beneficiaries of the Trust, and bring this action for thmselves and for the benefit of all other owners of such certificates who may desire to become interested herein; and in material substance allege that the District is dormant and in the future will be unable to operate or to furnish water for irrigating any of the lands, that Melville has all of the books and records of the Trust and has refused access thereto, and for this reason they are not able to more definitely allege many details of mismanagement and conversion and illegal actions; that the Trust was created for a period of 5 years only, at which time the trustees were required to distribute the assets and convey the system of irrigation works with all other property to the beneficiaries, but have not done so and have deliberately and unlawfully prolonged the life of the Trust with intent and for the purpose of securing personal benefit to themselves, their friends, relatives and associates; that they have illegally used trust funds to

improve farms, for purchasing seed and gasoline for the farmers, for erecting buildings, for drilling wells, for guaranteeing debts of others, for cancelling notes, for drilling and equipping irrigation wells, and did not acquire any water for irrigating District lands, for which wrongs plaintiffs have no plain, speedy or adequate remedy at law; and the prayer: (1) The court find and determine the liability of the individual defendants for misappropriation of funds and property of the Trust, and enter a joint and several judgment against them in favor of the Trust; (2) An order be entered converting the Trust assets into cash and distribute the same to the beneficiaries; (3) An order be entered impounding the books of the Trust in the registry of the court pending final determination; (4) An order be entered directing an audit of the books immediately, to the end of determining the liability of the individual defendants; and (5) for general equitable relief.

On the day of filing the complaint, without any hearing and without service of the complaint or summons or notice of any nature to defendants below, petitioners here, on plaintiffs' oral application and pursuant to paragraph 3 of the prayer of the complaint, the court entered an order and caused a citation to be issued against Melville, individually, which was served on the following day, to show cause at 2 o'clock p. m., on February 20, 1939, why an order should not be entered impounding in the registry of the court all of the books and records of the Trust and directing an audit thereof under the supervision of the court; and on that same day a notice was served on all defendant trustees that plaintiffs would apply for an order requiring said trustees to forthwith deliver to said clerk all books and records of the Trust, and for an order directing that an audit be made thereof under the su-

pervision of the court—said notice being attached to a copy of the summons and complaint served at that time.

In the forenoon of said February 20, the motion referred to was reduced to writing and supported by the affidavit of Dick, one of plaintiffs' attorneys, and forthwith affidavits were prepared by the president and by the secretary of the Trust controverting the statements in the Dick affidavit; and on the hearing of the matter at 2 o'clock in the afternoon Melville was called for cross-examination under the statute, and his testimony shows that no necessity for accounting existed, and that the books and records of the Trust always had been and then were open at all reasonable office hours for examination by all persons interested, and filed a written motion to make paragraphs 2, 4-11 of complaint specific, which motion was promptly denied without argument, and an oral demurrer interposed and overruled, although in the Declaration of Trust attached to the complaint, holders of certificates of beneficial interest could not bring an action until the system of irrigation works were completed and all indebtedness incurred by the Trust in connection therewith was paid.

Notwithstanding the above facts, without any testimony or other evidence upon the part of plaintiffs, the court entered an order appointing Ralph W. Mayo & Co., certified public accountants, to take charge of all said books and records and commence and complete such audit as soon as possible and make a report thereof to the court, the expense thereof to be borne by the Trust.

The above orders were carried out, but the court, instead of employing Ralph W. Mayo & Co. as accountants, employed Alexander J. Lindsay & Company, who completed the audit on June 8, 1939.

On July 10, 1939, defendants were served with a notice by plaintiffs that on July 13, 1939, at ten o'clock in the forenoon they would apply for an order for defendants to show cause why a receiver should not be appointed to take charge of and administer the assets of the Trust, in accordance with the prayer of the petition for a receiver thereto attached; a motion to strike portions of the petition, and motions to make the petition more specific, were denied without any argument being allowed, the court remarking that this is a case where a receiver is about the only remedy, and the court thought that a receiver should be appointed, and asked for the suggestion of counsel as to a proper bond in the situation; a demurrer was then filed to the petition, on the ground that the same does not state sufficient facts to constitute a cause for such appointment nor to justify any appointment of a receiver based thereon, which should have been sustained in view of the above mentioned clause in the Declaration of Trust and the fact that the complaint included two distinct causes of action, the one against the trustees and the other against them In their individual capacity, but the demurrer was overruled without argument and defendants given 5 days within which to answer and plaintiffs 24 hours within which to reply, and set the hearing for July 25, 1939; and on the hearing defendants orally objected to plaintiffs proceeding in the case until they made proof that plaintiffs were competent parties, and while the court ruled that the burden was on plaintiffs to make such proof, they were allowed to proceed without so doing and such proof has never been made, but on the contrary the testimony and documentary evidence presented by defendants prima facie shows that none of the plaintiffs is either an owner of land in the District nor an owner of a certificate of beneficial interest.

The complaint was verified by plaintiff Weybrew, but neither he nor any other plaintiff testified in any of the proceedings; the petition for a receiver was also verified by Weybrew, and in material substance alleges that the Trust was to continue for a period of 5 years, at which time the trustees were required to distribute the assets by conveying the system of irrigation works together with all properties to the beneficiaries, but have not dissolved the Trust nor distributed the assets or any part thereof, but on the contrary have deliberately and unlawfully pretended to prolong the life of the Trust, and now threaten to further prolong the life thereof with intent and for the purpose of securing personal benefits to themselves, their friends, relatives and associates, including payment to themselves or some of them of large fees and salaries; but the property in the hands of defendants belongs to these plaintiffs, and the other owners of certificates of beneficial interest, and none of the defendants has any right, title or interest threin; that at no time has an audit of said books been made, and reports which the trustees are required to make periodically have not been made, but on the contrary such few reports issued were palpably misleading; that the trustees have illegally diverted large sums, and those defendants who purport to act as trustees threaten to and will illegally divert and misappropriate further assets of the Trust unless the relief prayed for is granted by this court; that some of the defendants have paid themselves and to their friends and associates large sums of money as purported salaries or fees, thereby diminishing the trust estate, and some threaten to continue to make such payments; that the defendants purporting to act as trustees will, unless relief is granted by the court, misappropriate and dissipate said assets to the great injury of plaintiffs and the other owners of certifi-

cates of beneficial interest; that said Trust is insolvent and unless its affairs are immediately administered the creditors of the Trust and holders of certificates of beneficial interest will be greatly injured; and the prayer (1) for an order appointing some suitable person as receiver for the Trust, pending a final determination of this cause, with all powers usually given to such receivers to take charge of the property and assets of the Trust, to conserve and administer such assets and pay and discharge the lawful indebtedness thereof, subject to such orders of the court as may be necessary from time to time; (2) for an order directed to defendants commanding them to show cause before the court on a day certain why the relief herein prayed for should not be granted; and (3) for such other and further orders as may be appropriate and proper in the premises.

Within the five days granted, defendants filed their answer containing six defenses, which in substantial effect are: (1) the three extensions of the Term of the Trust; (2) appears from the record that plaintiffs are without legal capacity to sue; (3) the Declaration of Trust and terms of settlement submitted to and approved by the qualified electors, including plaintiffs, and including the terms and conditions under which certificates of beneficial interest are held; (4) plaintiffs are not the real parties in interest, and Fulenwider and Box Elder Farms Co. are the real parties conducting such action in plaintiffs' names; (5) defendant East Denver Municipal Irrigation District is indebted to defendant Trust in the amount of $155,642.21 and plaintiffs' counsel likewise direct the policy of said District in this action; and (6) specifically deny that District Landowners Trust is insolvent, but on the contrary is possessed of lands, water rights, personal property and assets of the minimum value of $300,000 over and above its current liabilities, and itemized said

items in form showing total assets over liabilities of $369,787.27.

The hearing began on July 25, 1939, without plaintiffs to prove *their competency to begin and prosecute such action, the burden of proof under the court's orders still resting on defendants to show cause why a receiver should not be appointed;* the plaintiffs seemingly relied mostly on the assumption that District Landowners Trust was created for a period of five years only, and somewhat on the testimony of the court's auditor, and to some extent on the general and financial statements made by the Trust and on certain letters and accounts introduced as exhibits; and defendants relied on plaintiffs' inabliity to prove themselves qualified to bring and maintain such action and on the legality of the three formal extensions of the term of the Trust, each executed and filed of record and recorded in said several counties prior to the expiration period of the preceding term and also upon the general rule applying to trusts, and upon the Declaration of Trust and its provisions, and upon the general and financial statements of the Trust issued from time to time being true and correct in all particulars, and upon the records of the board of trustees' meetings and all transactions of every nature being legal and within the powers of said board—all of which were introduced as exhibits and admitted in evidence; and, in addition presented the testimony of the accountant, Holben, on cross-examination, and that of Mrs. Carter and that of Melville substantiating the above financial condition of the Trust on that day, and that it had no pressing current indebtedness of any kind which it could not meet, and substantially sustained each of its pleaded defenses, and no testimony or evidence of any nature was presented in rebuttal.

Plaintiffs in the afternoon of July 28 rested, and

defendants moved for a dismissal of the petition on the record as made, since plaintiffs had made no effort to prove their competency to institute and maintain such action and no proof to sustain the allegations of the petition or of the complaint; and the court promptly denied the motion, exception was saved, and the court announced its findings generally in favor of plaintiffs and that a receiver would be appointed on the following day, Saturday, July 29, at 11 o'clock in the forenoon, as several persons had been recommended to him; counsel for defendants asked if the court would grant a stay of the order appointing the receiver, as counsel desired to petition the Supreme Court to review the order appointing a receiver to manage the properties and assets of the Trust, and the court denied the request.

Defendants immediately prepared and presented to the Chief Justice of the Colorado supreme court at 9 o'clock on the following morning an Application for Stay of Execution under Rule 22 (1 C. S. A. Rules of Supreme Court, page 627), to which were attached the record of the court below, beginning with the filing of the complaint on February 16, 1939, and ending on July 28, 1939, in accordance with Rule 18 (1 C. S. A. Rules of Supreme Court, page 624) allowing review on error.

The court being in vacation, but a majority subject to call, the Chief Justice instructed the clerk of the supreme court to telephone the district judge to stay further proceedings until Monday morning, July 31, as the matter then would be heard by the supreme court, and the clerk so did; but, notwithstanding such fact, the trial court at 11 o'clock on said Saturday, entered a decree in material substance that the court had jurisdiction, all the allegations of the petition were sustained and true, all the property and assets of the

Trust belong to plaintiffs and other holders of certificates of beneficial interest, the facts justified the appointment of a receiver; Teller Ammons, a resident of the City and County of Denver, was appointed receiver for all the property and assets of the Trust, and for all the rents and profits thereof, to handle the same under the direction of the court, a stay of execution granted for 5 days provided all books and records of the Trust are deposited with the clerk of this court, until the further order of the court none of the defendants act as trustees nor incur any additional indebtedness or obligations, nor expend any funds now in the hands of the Trust or which may be collected without an order of the court, and said trustees shall not contract for new or additional works or improvements nor institute any additional litigation in any manner affecting the Trust estate.

Counsel for defendants then filed a motion for rehearing on August 3, 1939, consisting of 27 alleged errors committed by the trial court, which was promptly overruled; and afterwards on August 10, 1939, I. B. Melville, as one of the attorneys for defendants, filed a petition reciting in substantial substance that the decree of the court prohibited the Trust from expending any funds without an order of the court, that this cause had been docketed in the supreme court and a bill of exceptions and transcript had been ordered; that on July 21, the Trust had employed Harold G. King to prepare the answer to the petition for a receiver and to try the case in this court and prosecute a writ of error to the supreme court to review any order entered herein, and had agreed to pay him a sum not exceeding $1,000, and had paid him $200 on account, and he now required an additional $500 for supreme court work—prayed that an order be entered permitting the Trust to pay the court reporter for

bill of exceptions, the clerk for the transcript of record, and attorney King $500 for his services to be rendered.

Thereafter on August 10, 1939, the court formally denied the motion for a rehearing; and on the same day denied the petition for the bill of exceptions, the transcript of record, and attorney's fee—but later allowed defendant Trust to pay the reporter for bill of exceptions and ordered the clerk to furnish the transcript of record, the pay therefor to be determined later; and thereafter and on September 22, 1939, defendants filed in the supreme court their application for a supersedeas, praying that the writ of error be endorsed to operate as a supersedeas, and that the cause be finally determined upon such application.

On February 14, 1940, argument of counsel was heard by the supreme court; and afterwards on April 8, 1940, the supreme court filed its written Opinion affirming the judgment of the trial court; and afterwards on May 4, 1940, within the time granted by the supreme court, plaintiffs in error filed their petition for a rehearing in said supreme court, reciting at length the alleged errors committed, and supported the same by extensive excerpts from the record with citations of authorities; and thereafter and on June 3, 1940, the petition for a rehearing was denied by the supreme court; and thereafter and on June 10, 1940, plaintiffs in error filed their praecipe with the Clerk of said Supreme Court for a transcript of the record to be used in making application to the Supreme Court of the United States for a writ of certiorari, and therein asked for ten authenticated and certified copies of the printed record in said cause containing the essential parts of the record on error in said supreme court, including the application for a writ of error to operate as a supersedeas and the documents attached thereto, and all subsequent proceedings in the supreme

court, including the application to the Chief Justice of the supreme court for an extension of 30 days, and his order made on August 30, 1940, granting an additional 30 days from September 3, 1940, and the praecipe of defendants in error asking the last above be included in the printed record, including this summary statement and the assignments of error in this court, both of which have been filed in the office of the clerk of the supreme court of Colorado.

All of the pleadings, petitions, motions, demurrers, rulings and orders of the trial court, and all matters in the supreme court of the State of Colorado, including its written opinion, the judgment and its order denying the petition for rehearing are included in the printed record and each indexed to the page where found.

Petitioners affirm that the errors committed by the trial court, as assigned for error in the supreme court of Colorado, and the errors committed by said supreme court in affirming the rulings, orders and decree entered by the trial court, as contained in the petition for rehearing in said supreme court, and the denial of such petition for rehearing, are each contrary to that portion of article 5 of the amendments to the Constitution of the United States, in that your petitioners have been deprived of their property without due process of law; and are contrary to section 1 of article 14 of said amendments, in that their written contract with respondents has been set aside, they have been deprived of their property without due process of law, and they have not been given the equal protection of the laws—and for the above reasons your petitioners are entitled to relief in this court.

Respectfully submitted,

I. B. MELVILLE,
Attorney pro se and Attorney for other petitioners.

PETITIONERS' ASSIGNMENTS OF ERROR

Come now your petitioners and make known to this Honorable Court that the supreme court of the state of Colorado committed grievous errors in affirming the orders and decree of the trial court, and like errors in denying the petition for a rehearing of plaintiffs in error therein, your petitioners here, in the following particulars:

First. In erroneously assuming, and so holding, that plaintiffs below had legal capacity to institute or to maintain said action.

Second. In erroneously holding that the trial court had jurisdiction of the cause below.

Third. In holding with the lower court that the burden of proof was on defendants below to show cause why the books and records of defendant District Landowners Trust should not be impounded in the registry of the trial court, and an accounting thereof made at the expense of the Trust.

Fourth. In holding that there was any evidence sufficient to warrant the trial court in impounding said books and records and having the same audited, or in having the expense taxed to defendant Trust below.

Fifth. In holding that the burden of proof was on defendants below to show cause why a receiver should not be appointed to take charge of all the property and assets of the Trust and collect all rents and income and pay all debts.

Sixth. That the court erred, both in upholding the trial court and in denying the petition for a rehearing, in holding that plaintiffs could include in their complaint both an action against the Trust and the trustees, and also against present and past trustees in their individual capacity.

Seventh. In holding that there was any evidence sufficient to warrant the appointment of a receiver.

Eighth. In holding that the Term of the Trust had expired, and that all the property constituting the Trust Fund is the property of plaintiffs and other holders of certificates of beneficial interest.

Ninth. That the court erred, both in upholding the trial court and in denying the petition for a rehearing, in removing the trustees and replacing them with a receiver.

Tenth. That the court erred, both in upholding the trial court and in denying the petition for a rehearing, in enjoining defendants from using any funds for the employment of Harold G. King, in view of the admitted fact that associate counsel Melville was in such ill health as to be unable to prepare and prosecute a writ of error to the supreme court of Colorado.

Eleventh. That the court erred, both in upholding the judgment of the trial court and in denying the petition for a rehearing, in that it deprived defendants and particularly defendant District Landowners Trust of their property without due process of law contrary to the provisions of article 5 of the amendments to the constitution of the United States, and also contrary to the provisions of section 25 of article 2 of the constitution of the State of Colorado.

Twelfth. That the court erred, both in upholding the judgment of the trial court and in denying the petition for a rehearing, in that it impaired and set aside the written contract between defendant District Landowners Trust and plaintiffs contrary to section 1 of article 14 of the amendments to the constitution of the United States, and contrary to section 3 of article 2 of the constitution of the State of Colorado.

Thirteenth. That the court erred, both in upholding the judgment of the trial court and in denying the petition for a rehearing, in that it deprived defendants and particularly defendant Trust of their property without due process of law contrary to section 1, of article 14 of the amendments to the constitution of the United States, and also contrary to the provisions of section 25 of article 2 of the constitution of the State of Colorado.

Fourteenth. That the court erred, both in upholding the judgment of the trial court and in denying the petition for a rehearing, in that it deprived defendants and particularly defendant District Landowners Trust of the equal protection of the law contrary to section 1 of article 14 of the amendments to the constitution of the United States, and also contrary of the supreme court decisions and laws of the State of Colorado.

Respectfully submitted.

I. B. MELVILLE,
Attorney pro se and Attorney for other Petitioners for a Writ of Certiorari.